INDEX

	Page
I. The Issue of Racial Discrimination	2
II. The Permeation Issue	5

CASES AND AUTHORITIES CITED

CASES:

Board of Education v. *Allen*, 392 U.S. 236 (1968)	5
Johnson v. *Sanders*, Civ. Action No. 13,432 (D. Conn., decided Nov. 20, 1970)	4
Lemon v. *Kurtzman*, No. 89, 1970 Term	4
Pierce v. *Society of Sisters*, 285 U.S. 510 (1925)	2
United States v. *Fruehauf*, 365 U.S. 146 (1961)	3
W. E. DuBois Clubs v. *Clark*, 389 U.S. 309 (1968)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 569

JOHN R. EARLEY, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, ET AL., *Appellants,*

v.

JOAN DICENSO, ET AL., *Appellees.*

On Appeal From a Three-Judge United States District Court for the District of Rhode Island

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REPLY BRIEF

In view of the heavy volume of written material now before the Court in these cases, the appellants submit this reply brief with some reluctance. However, two aspects of the argument developed by the appellees in their brief compel a written response. The first is the appellees' scurrilous effort to inject

the issue of racial discrimination into these cases at this late date. The second is the method by which the appellees attempt to overcome their failure to prove at trial that religion permeates those phases of secular instruction in parochial schools that are aided by public funds. This reply brief will be strictly limited to those two issues.

I.

The Issue of Racial Discrimination

In their brief submitted to this Court, the appellees suggest for the first time in this litigation that the Salary Supplement Act should be struck down under the Equal Protection Clause of the Fourteenth Amendment. The basis for that claim is as amorphous as the claim itself. The appellees seem to be arguing that the mere fact that fewer blacks attend religiously affiliated schools than attend public schools is a sufficient ground for invalidating educational assistance programs that benefit, *inter alia,* religiously affiliated schools. But the innuendos of appellees' argument sweep far more broadly and invidiously. The appellees accuse parents who choose to send their children to religiously affiliated schools* of being motivated in that choice by bigotry and racial bias. And the appellees suggest that religiously affiliated schools are willing partners with parents in the efforts to avoid the consequences of racial integration of the public schools. Such an unfounded attack on parents and religiously affiliated schools deserves condemnation, rather than consideration, by this Court.

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* Parents have a constitutional right to choose private schools rather than public schools for the education of their children. *Pierce* v. *Society of Sisters,* 285 U.S. 510 (1925).

If the appellees' Equal Protection arguments were properly before the Court, they would present the Court with difficult factual and constitutional problems. Surely the appellees' haphazard and highly selective collection of statistics and "facts" are woefully inadequate to illuminate the constitutional implications of the appellees' supposed legal argument. For example, the issue in these cases is whether the Rhode Island General Assembly exceeded constitutional limitations on its power by enacting the Salary Supplement Act. The appellees would have this Court invalidate that statute under the Equal Protection Clause. Yet their brief contains no information concerning the racial composition of either public or nonpublic schools in Rhode Island. How then is the Court to apply the appellees' proposed Equal Protection doctrine to the facts of these cases? This Court has consistently displayed a reluctance to decide "important and difficult constitutional issues . . . devoid of factual context." *W.E. DuBois Clubs* v. *Clark*, 389 U.S. 309, 312 (1968); cf. *United States* v. *Fruehauf*, 365 U.S. 146, 157 (1961). These cases are totally devoid of any facts developed through the adversary process to illuminate the Equal Protection arguments that the appellees have now injected.

However, the Court need not concern itself with how it might decide such an Equal Protection claim if it were properly before the Court. For such a claim is not properly before the Court in these cases. The appellees concede that "[w]e did not raise the Equal Protection claim in the present case but relied exclusively on the First Amendment." Appellees' Brief, p. 53. That is perhaps the only credible assertion made by the appellees in the course of their Equal

Protection argument. The Equal Protection claim was not pleaded in their complaint. No evidence was presented during the trial bearing on such a claim. And the trial court did not take account of any such claim by the appellees in its opinion. If this Court were to decide this case on the Equal Protection grounds urged by the appellees, it would be issuing an advisory opinion and would thereby exceed the power conferred by Article III of the Constitution.

The attorneys for the appellees cannot complain of an oversight in failing to raise the Equal Protection claim at an earlier stage of these cases. One of the appellees' attorneys—Mr. Leo Pfeffer—signed the complaints filed in *Lemon* v. *Kurtzman,* No. 89, 1970 Term, and *Johnson* v. *Sanders,* Civ. Action No. 13,432 (D. Conn., decided Nov. 20, 1970). Both of those complaints pleaded an Equal Protection claim similar to that now being argued by the appellees, and both of those complaints were filed before the complaint in these cases. Consequently, the appellees' failure to raise their Equal Protection arguments at an earlier stage of this case must be viewed as deliberate, and they should be barred from any consideration of those arguments by this Court.

This Court's Rules provide a mechanism for dealing with litigants such as the appellees who submit burdensome and irrelevant matter. Rule 40(5) requires that briefs be "free from burdensome, irrelevant, immaterial, and scandalous matter." It further provides that "[b]riefs not complying with this paragraph may be disregarded and stricken by the court." The pages that appellees' brief devotes to their Equal Protection argument clearly constitute "irrelevant" and "immaterial" matter. And appellees' effort to

attach the stigma of racially discriminatory policies to all religiously affiliated schools is "scandalous" by any definition of that word. The appellants respectfully suggest that the Court consider invoking the sanctions of Rule 40(5) against the appellees for their attempt to inject unfounded allegations of racial discrimination into these cases at the present stage of their proceedings.

II.

The Permeation Issue

The appellees construct their permeation argument on a single document—the Handbook of School Regulations of the Diocese of Providence. The appellees choose to ignore the critical fact that teachers who appeared at trial testified that the Handbook had no force or effect on how they taught their secular courses. See Appellants' Brief, No. 569, pp. 73-74. The appellees also carefully and deliberately avoid any reference to the trial testimony which convincingly refutes any contention that teachers receiving salary supplements are permeating their secular courses with religion, and the specific findings of non-permeation entered by the trial court. J.A. 35-37. The appellees' feeble efforts to weave a permeation argument are, of course, a concession that, under *Board of Education* v. *Allen*, 392 U.S. 236 (1968), they must carry the burden of proof on the permeation question if they are to prevail. But any fair reading of the total evidence presented on that question demonstrates the failure of the appellees to carry that burden.

The appellees' permeation argument betrays their misunderstanding of the essential issues in this litigation. The appellees appear to assume that the parochial school system in Rhode Island is on trial and

that the permeation question can be resolved by simply examining a few broad policy declarations attributable to that school system. But the State has not undertaken to aid parochial schools generally. The funds appropriated under the Salary Supplement Act go only to those nonpublic school teachers who qualify under the statute's carefully tailored program to aid secular teaching. Not all teachers in Rhode Island parochial schools have qualified or have sought to qualify under the Act. Indeed, there is testimony offered by the appellees showing that teachers in "many parochial schools" have not sought salary supplements. J.A. 150.

Consequently, the permeation issue in this litigation must be resolved by reference to the teaching methods employed by teachers receiving state funds—and not by reference to teaching methods that might be employed in parochial schools generally. The appellees ignore this critical distinction and invite this Court to infer the existence of permeation on the basis of a few isolated sentences in the Handbook of School Regulations. But the teachers who testified at trial said they were unfamiliar with the Handbook, and they all denied unequivocally injecting any religious content into their secular courses. Even the appellees concede that parochial school teachers do not view the Handbook as obligatory in all of its particulars. As a result, it is simply not possible for the Court to infer from a few isolated sentences in the Handbook that parochial school teachers receiving salary supplements engage in permeation when the unchallenged testimony of such teachers refutes any such inference.

The appellees were not without other evidentiary resources in their effort to prove that State funds were

supporting religiously permeated secular teaching. They could have called as their witnesses the more than 250 parochial school teachers who had qualified for salary supplement payments. However, except for taking the depositions of three such teachers, J.A. 158, 231, 242, they avoided that source of potential proof. And the three teachers they deposed denied unequivocally that they engaged in permeation practices. J.A. 103, 241, 252. The appellees also could have confronted those teachers who testified at trial with the Handbook provisions that might appear to be inconsistent with their testimony of non-permeation. But the appellees deliberately avoided such a confrontation. For that reason, the appellees have failed to establish any link between the Handbook provisions they rely on and the actual teaching methods employed by parochial school teachers who have qualified for salary supplement payments.

The appellees seek to buttress their preference for a single document rather than the sworn testimony of teachers by emphasizing that the Handbook has been given the force of "synodal law." Appellees' Brief, p. 24. Then they rather quickly equate "synodal law" with "canon law," *id.* at 24, 25, and label the Handbook itself "canon law." *Id.* at 24. But the appellees' brief contains no explanation of what the force or effect of synodal law is, how synodal law becomes canon law, or how a publication intended for use in elementary schools becomes part of the canon law of the Roman Catholic Church. The reasons for those omissions are obvious. There is no evidence in the record of these cases bearing upon those theological questions, and neither the appellees nor their attorneys have the necessary expertise to enlighten the Court on such theological matters.

The appellees might have laid a proper evidentiary foundation for their theological arguments by presenting expert testimony on those issues at trial. But they offered no such evidence, even though they had an opportunity to do so. The appellees' only witness at trial was Rev. Edward W. K. Mullen, the Superintendent of Schools for the Diocese of Providence. Presumably he could have explained the significance of giving the Handbook the force of synodal law. But the appellees did not seek any such enlightenment from Father Mullen.

This brief is not the appropriate vehicle for engaging in a theological debate with the appellees. But it should be stressed that, absent competent evidence of the meaning and scope of synodal and canon law, the Handbook attains no greater significance by equating its provisions with synodal or canon law.

Respectfully submitted,

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